No. 11985
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In The United States Court of Appeals

For the Ninth Circuit

No. 11985

WILLIAM LESLIE KOHL, *Appellant*,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation, *Appellees*,

UNITED STATES OF AMERICA, *Intervenor*.

No. 11984

ARTHUR J. SESSING, *Appellant*,

vs.

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UNITED STATES OF AMERICA, *Intervenor*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

I.

OBJECTIVES OF PORTAL-TO-PORTAL ACT OF 1947 (29 U.S.C.A. §§251-262)

A large part of appellees' argument in support of the judgment of the District Court may be summarized by the French expression *"c'est la guerre."* In fact, many District Court opinions applying the

act seem to treat the Portal-to-Portal Act as a sovereign panacea for curing any liability under the Fair Labor Standards Act (29 U.S.C.A. §§201-219) incurred by anyone operating under government contract during the war years. Such was not the intent of Congress.

The intention of Congress in passing the Portal-to-Portal Act of 1947 (29 U.S.C.A. §§251-262) was to relieve employers from liability for acts which, at the time of their commission, could not reasonably have been anticipated to violate the Fair Labor Standards Act, and to give immunity to employers who had honestly been misled into violating the Fair Labor Standards Act by relying upon and complying with, in good faith, orders, rulings, regulations, and so forth, of a government agency.

The Congress was fully aware of the standard provisions of cost-plus-a-fixed-fee contracts let by the Army and Navy during the war. Had the Congress intended to relieve all employers operating under such contracts from liability under the Fair Labor Standards Act, Congress would have chosen apt words to effect that objective.

There is nothing in either the Fair Labor Standards Act or the Portal-to-Portal Act making the fact of war a defense.

II.

EFFECT OF "DIRECTIVES" AND ORDERS RECEIVED BY APPELLEES

The Fair Labor Standards Act, Title 29 U.S.C.A. § 207(a)(3) provides that premium rates of time and one-half for all hours worked in one workweek in excess of 40 are payable to employees engaged in commerce.

"Commerce" is defined by the Act, Title 29 U.S.C.A. §203(b) as:

> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Thus, the sole criterion for determining applicability of the Fair Labor Standards Act is whether or not a given employee is engaged in interstate commerce. Certain exceptions are made in the act from the class of employees covered, none of which has been seriously urged concerning these appellants.

The prime contract, Exhibit 13, Circular Letter 2236, Exhibit 14, and the Abersold Directive, Exhibit 16, all relate to wage policies for all contractors on all projects. Each of these exhibits divided appellees' employees into certain groups based on wage brackets. Group B, to which appellants belonged, was defined as follows:

> "Group 'B'. Employees whose base salaries are between $50.00 and $90.00 per week, inclusive, except those included in Groups 'D' and 'E'.

Overtime provisions with respect to such a classi-

fication have no relation at all to the Fair Labor Standards Act and its requirements. The applicability of the Fair Labor Standards Act depends solely on what a given employee actually does.

Appellees assert that their submission of data to the Army Wage Administration Agency, Exhibit 42, elicited further approval by the War Department of appellees' policies with respect to the payment of overtime. Since the amount of wages due an employee has nothing to do with whether or not he is entitled to overtime compensation, the blanket approval of overtime policies with reference to Group B employees is immaterial to these cases. We must look to the activities of the employees for guidance.

The only data ever submitted to the War Department while these appellants were employed by the appellees were the job descriptions which formed a part of Exhibit 42. During most of his tenure of employment with appellees, the appellant Kohl was classified as an assistant accountant. His job was described in Exhibit 42 as follows:

> "Under the direction of the accountant, supervises one or more of the functions of the accounting department."

The appellant Sessing was classified as a timekeeper. His job was described in Exhibit 42 as follows:

> "Keeps and maintains time records of contractor's employees, and prepares preliminary reports therefrom and certifies same to superior."

A comparison between these job descriptions and the actual work performed by appellants as set forth in the record of these cases in appeals numbered

11464 and 11465 and pages 3-5 of appellants' brief in the former appeals, numbered 11464 and 11465, in which appellants appear as appellees, will readily show the gross inadequacy of these job descriptions for any use whatever in determining applicability of the Fair Labor Standards Act.

The job descriptions submitted in Exhibit 42 were completely adequate for the purpose for which they were submitted, namely, wage stabilization, but from the entire submission, Exhibit 42, no one could possibly form an intelligent opinion one way or the other as to applicability of the Fair Labor Standards Act, and no one purported to do so.

Moreover, the submission for wage stabilization purposes (Exhibit 42) was a combined submission made by the appellee Guy F. Atkinson Company on behalf of all cost-plus-a-fixed-fee contractors in this area and the job descriptions were so compiled as to apply to all projects. As a matter of fact, the record in the first trial of these cases shows without contradiction that there were important differences in procedure and duties of employees of the same classification on the different projects themselves. (R. 11463, pp. 508-509, 516-517, 518-520) In some instances the difference in duties between projects might make the difference between an employee's being in interstate commerce or not.

Appellees reply upon Exhibit 16, the Abersold Directive in response to Exhibit 42, as being an approval or a ruling on their overtime policies with reference to these employees. Yet there were no facts submitted which would or could disclose to anyone the possibility

that the Fair Labor Standards Act applied to part of appellees' employees.

Recognizing that the prime contract (Exhibit 13) and Circular Letter 2236 (Exhibit 14) could not answer problems concerning the Fair Labor Standards Act, the War Department in Exhibit 21 invited the contractors to submit these problems to the proper civilian agencies through the War Department. Paragraph 2.a. stated:

> "If a ruling is required from a civilian agency it will be obtained by or through the War Department."

The appellees never took the slightest advantage of this offer, and the evidence shows without contradiction that appellees never asked the War Department or anyone else whether or not the Fair Labor Standards Act applied to their employees.

The organization charts and wage schedules prepared and submitted to the War Department by appellees contained no information even relevant to the problem. These submissions were made solely for purposes of wage stabilization and to secure to appellees an adequate non-manual working force without violating wage stabilization policies.

The appellees set out in their brief (pp. 16-17) a letter from Mr. Walling, the Wage and Hour Administrator (Exhibit 55). The letter states upon its face that the party whose inquiry it answers did not claim to be within the coverage of the Fair Labor Standards Act and that the nature of the project upon which he was employed was not disclosed in the inquiry. There was nothing from which anyone

could determine whether the Fair Labor Standards Act applied or not.

These appellants have never and do not now assert that the War Department, the Corps of Engineers and the War Department Wage Administration Agency are not agencies of the United States or that the acts of the contracting officers were not duly authorized.

These appellants do most earnestly contend that not one document in evidence in these cases constitutes an administrative regulation, order, ruling, approval or interpretation of an agency of the United States. All are exactly what they purport to be: instructions of one contracting party to another.

Appellees rely heavily upon the case of *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F. Supp. 553. The facts of that case are so peculiar as to yield no precedent for decision outside the Territory of Hawaii and the court implies that the result would be the same without the Portal-to-Portal Act. In the *Kam Koon Wan* case the military authorities had completely supplanted civilian authority for all purposes. The Hawaiian Islands were under military government. The court describes the situation in this way:

> "* * * It is a matter of common knowledge in Hawaii that during the days of military government one disregarded a military order or policy —even at one time unknown and unpublished ones—upon the peril of being summarily brought before a provost court, whose high record of rapid-fire convictions made punishment, often irrespective of guilt and the laws of the United States or of the Territory, a foreseeable certainty. The situation was one of military dictatorship and one did as ordered to do. * * * The Constitu-

tion and federal and territorial law was cast aside, and the defendant and all other persons in Hawaii were told by military order what to do and theirs was not to question or to reason why. There was no freedom of choice open to the defendant, and therefore this is not an instance of electing to rely upon the more favorable of conflicting rulings." (p. 560)

"* * * The important fact is that the defendant presumably would have complied with the Act if it could have and did so as soon as it could, but until the military orders allowed, compliance was impossible. * * * This is not an instance of an employer electing to follow a civil order, rule or regulation issued by an officer of the government. Rather it is an instance, which would not happen in a State, of a military officer of our government, with the full support of the Secretary of War, under arms dictating to employers within the area where he had taken unto himself all power in the guise of a Military Governor that they follow his policy relative to hours and wages —not that of Congress—or else! It, therefore, seems to me to present a far stronger defense than that which Congress had indicated it was willing to recognize and to be within the aim and spirit of §9 of the Portal-to-Portal Act." (p. 561)

Curtis v. McWilliams Dredging Co., (City Court of N. Y.) 78 N.Y.S. (2d) 317, is also relied upon by appellees as holding that Circular Letter 2236 (Exhibit 14), is a ruling of an agency of the United States. This case also held §9 of the Portal-to-Portal Act unconstitutional. We do not understand appellees to

follow the City Court of N. Y., on the latter point. However, certain facts were shown by the evidence in the *Curtis* case that merit attention. Prior to the issuance of Circular Letter 2236 (Exhibit 14), in our cases, these events had transpired:

> "* * * Thereupon the defendants wrote for instructions in a letter prepared for them by their attorneys. They stated '* * * we draw to your attention that in recent months the United States Department of Labor, Wage & Hour Division, under whose jurisdiction comes the administration of the Fair Labor Standards Act, * * * has issued interpretative bulletins bearing upon overtime in the contracting industry. We are advised that such interpretative bulletins very clearly state that in the opinion of the Wage and Hour Division, many of our personnel who from time to time work overtime are covered by the provisions of the Federal Wage and Hour Law. If that is so, such of our personnel so covered would be entitled to time-and-a-half for overtime.'
>
> "The response, November 7, 1941, was as follows: 'You are advised that no compensation will be allowed for such overtime work either in the form of an equal amount of time off with pay or in the form of extra pay for extra hours of duty'." (p. 323)

The court then goes on to detail a course of dealing between War Department and contractor similar to that in our cases with one notable exception. No mention is made of anything comparable to our Exhibit 21, the letter offering to apply for rulings from civilian agencies on behalf of contractors having problems concerning the Fair Labor Standards Act. In

answer to the plaintive query, "What were the defendants to do?" we must, in our cases answer, "Do what the War Department requested you to do. Ask for a ruling from the appropriate agency, and the Department will get it for you."

III.

REQUIREMENTS FOR A DEFENSE UNDER §§9 AND 11 OF THE PORTAL-TO-PORTAL PAY ACT OF 1947 (29 U.S.C.A. §§258 AND 260)

The sections upon which appellees rely for a defense to these actions are fully set forth in Appendix A. The pertinent portions of these sections provide:

> "§258. Reliance on past administrative rulings, etc.
>
> "In any action or proceeding, * * * based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay * * * overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States * * *."
>
> "§260. Liquidated damages
>
> "* * * If the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title."

The act or omission complained of is the failure of appellees to pay overtime to these appellants as required by the Fair Labor Standards Act. The question is: Was this failure in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation of any agency of the United States?

Appellees concede that none of the documents upon which they rely related to the Fair Labor Standards Act, but they argue, such reference is not necessary.

Appellants agree that no reference to the Fair Labor Standards Act *eo nomine* is required, but it is clear that the regulation, ruling, order, approval or interpretation must relate to the act or omission complained of and must be based upon data from which an intelligent opinion could be formed.

There was no reason why overtime should have been paid to Group B employees in general, and in the light of the job descriptions submitted for wage stabilization purposes. There was every reason why overtime should have been paid to these appellants in the light of what they actually did.

The act or omission complained of is not violation of the Wage Stabilization Act, but violation of the Fair Labor Standards Act, and the criteria for compliance with the two acts are totally different.

IV.

THE WAR DEPARTMENT AS A CONTRACTING PARTY

As pointed out in our opening brief, the War Department, in the transactions giving rise to these

cases, acted not in an administrative capacity, but in an executive capacity as a contracting party. *Jackson v. N. W. Airlines*, 76 F. Supp. 121. While there is no question but that a government department can act in both capacities, here the War Department did not purport to do so.

In the instant case, when the appellees asked if they should pay overtime under certain contracts, (not to certain types of employees doing certain things) Exhibit 74, the contracting officer replied that overtime was payable only if the Fair Labor Standards Act applied and he didn't know whether it did or not, Exhibit 75. There the matter ended.

The War Department itself did not consider its "directives" administrative regulations, orders, rulings, approvals or interpretations with respect to overtime payment under the Fair Labor Standards Act since it offered to procure rulings on the question from the appropriate agency (Exhibit 21).

V.

GOOD FAITH

Appellees invoke Rule 52(a) of the Federal Rules of Civil Procedure as barring reconsideration by this court of the issue of whether or not appellees' asserted reliance upon the various documents in evidence here was in "good faith." The pertinent portion of Rule 52(a) reads:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

For some years after the adoption of the Federal

Rules of Civil Procedure it was uncertain whether this portion of Rule 52(a) followed the former law or equity rule. Such doubts have at last been set at rest by the Supreme Court in *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. ed. 552, wherein the Supreme Court states that Rule 52(a) makes the old equity rule applicable and discusses the effect of the rule as follows:

> "In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. * * * It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (pp. 394-395)

In the case at bar there was no dispute in the evidence and hence no question of credibility of witnesses before the trial court.

Whether or not appellees acted in good faith is undoubtedly a question of fact, but what constitutes good faith is a conclusion to be drawn from all the circumstances. In *Divins v. Hazeltine Electronics Corp.* (D.C.S.D., N.Y.) 79 F. Supp. 513, the District Court observed:

> "Good faith cannot be established as a simple fact, such as the signature to a document. It is an ultimate fact—a conclusion to be drawn from all the circumstances." (p. 514)

This statement was reiterated by the United States District Court for the Western District of Pennsylvania in *Burke v. Mesta Machine Co.*, 79 F. Supp. 588 at page 611, where that court further explains:

> "The test of good faith is an objective one, and not the actual state of mind of the employer." (p. 611)

In *Hoffman v. Todd & Brown* (U.S.D.C., N.D., Ind. S.B. Div.) 15 Labor Cases §64,856, the court quotes and follows the following rule from the *Burke* case *supra*:

> "The defense of 'good faith' is intended to apply only where an employer innocently and to his detriment followed the advice as it was laid down to him by governmental agencies without notice that such interpretations were claimed to be erroneous or invalid."

Neither the *Burke* or the *Hoffman* case was before the trial court in these cases.

The evidence on the question of good faith has been fully discussed in our opening brief, but it may not be amiss to review it briefly.

On June 28, 1943, the Corps of Engineers advised

appellees that problems concerning the Fair Labor Standards Act should be submitted through the War Department which, in turn, would obtain rulings from the appropriate agency upon request (Exhibit 21).

On March 21, 1944, Procurement Regulations 9 and 11 were published in the Federal Register at pages 2989 and 2992 (Exhibit 81), respectively, advising all the world that the War and Navy Departments and Wage and Hour Division disagreed on the applicability of the Fair Labor Standards Act, and had agreed upon procedures for handling claims under the act, and assuring contractors of *reimbursement* for amounts paid in settlement of such claims. Appellees had not only constructive, but actual notice of this dispute and these procurement regulations (R. 288, 354-355).

On April 13, 1944, in response to appellees' letter, Exhibit 74, Major George F. Tait, Corps of Engineers Contracting Officer, transmitted to appellees the letter marked Exhibit 75, the pertinent portions of which were quoted in our opening brief at pages 11 and 12, and which is quoted in full in the brief of appellees at pages 8 to 9. In this letter the War Department, through its authorized agent, advised the appellees that overtime was payable to Group B employees only if the Fair Labor Standards Act was applicable, that the War Department and the Wage and Hour Division did not agree on the applicability of the Act to these employees, and in paragraph two of the letter the contracting officer makes the following interesting statement: "The Act exempts supervisory em-

ployees but nothing is said about semi-supervisory employees, so the debate is still unsettled." Thus the only inference that can be drawn from Exhibit 75 is that the Fair Labor Standards Act was considered applicable to appellees' operations by both the Wage and Hour Division and the War Department but that the War Department believed all Group B employees to be exempt on the ground that these employees were either executive or administrative, although the War Department frankly advises appellees that the Wage and Hour Division does not share this view.

At the time this letter, Exhibit 75, was received by appellees, regulations of the Wage and Hour Administrator were in effect covering the disputed point. Sections 541.1 and 541.2 of Title 29 C.F.R., promulgated October 12, 1940, 5 F.R. 4077, specifically defined executive and administrative employees within the meaning of the exemption in the Fair Labor Standards Act. This fact brings the instant case squarely within the following language of the case of *Hoffman v. Todd & Brown, supra,* in which the United States District Court for the Northern District of Indiana, South Bend Division stated:

> "In its memorandum the defendant says that 'all matters concerning employee and labor relations were controlled through the Labor Section of the office of the Chief of Ordinance' and 'throughout the entire period for which overtime is claimed in this action, each and all of the plaintiffs were paid compensation fixed and determined by the rulings, approval and authority granted by the War Department.' Even though these assertions be true, the defendant cannot utilize them as a basis for a defense under Sec-

> tion 9 of the Portal-to-Portal Act of 1947. Section 9 relieves the employer of liability if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation of any agency of the United States. Regulations 541.1 and 541.2 of the Wage and Hour Division are the administrative regulations which were applicable in this instance. The defendant here cannot be found to have acted in good faith conformity with War Department rulings, regardless of their effect, when the Wage and Hour Administrator had spoken previously with clarity and authority."

As soon as problems arose under the wage stabilization program, appellees were zealous in their efforts to assemble data for a ruling from the Wage Stabilization Agency, because, the record shows, (R. 239, 417-418) violation of the wage stabilization orders would have resulted in withholding of current reimbursement for costs.

In spite of the fact that the War Department itself advised appellees that applicability of the Fair Labor Standards Act to their employees was a question shrouded with doubt and confusion, Exhibits 75 and 81, appellees never bothered to request a ruling on the point. Why? Because payment of wages and overtime compensation in accordance with their contract, Exhibit 13, assured them of current reimbursement for costs, and the War Department had promised reimbursement for amounts appellees might pay in later settlement of claims or judgments under the Fair Labor Standards Act (Exhibit 81, R. 271, 475).

Appellees attempt to inject a great deal of uncer-

tainty into the law, where none exists, by suggesting that the applicability of the Fair Labor Standards Act to employees engaged in original construction is a matter of uncertainty. A glance at the record in the first appeals of these cases, Nos. 11464 and 11465, will demonstrate that the appellees here involved never did, or claimed to do, any construction work of any kind. No one has contended that the pounding of nails or the pouring of concrete for original construction brings employees performing those tasks within the Fair Labor Standards Act. The case of *Murphey v. Reed*, ... U.S. ....., 93 L. ed., Adv. O. 91, 17 L.W. 4017, was appealed from the Circuit Court of Appeals for the Fifth Circuit, 168 F.(2d) 257, and was remanded to the District Court on the same basis that the case of *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S. Ct. 1031, 92 L. ed. 989, was sent back; namely, that the records in these two cases were so inadequate that no appellate court could decide the issues involved. The Circuit Court of Appeals in the *Murphey* case said:

> "We have dredged up from the record, which is in many respects vague and uncertain, the important and material facts upon which the decision must turn." (168 F.(2d) 259)

The Supreme Court apparently did not feel that there were sufficient facts in the record to warrant dredging. It is true that the Supreme Court ordered dismissal of the cases involving construction employees, but the record was inadequate to determine that there was any basis for coverage. Such a decision in the present state of that case cannot be considered authority for anything. In any event, the record in

the instant case is clear that appellees were at no time confused on this point.

CONCLUSION

In the final analysis these cases present this situation: The appellees at all times knew that the War Department and the Wage and Hour Division did not agree on whether or not the Fair Labor Standards Act applied to their operations. The appellees had a contract with the War Department which provided for reimbursement to the appellees weekly of all labor cost. As long as the appellees paid wages and overtime compensation strictly in accordance with the terms of their contract, and as the War Department told them to, they were assured of weekly reimbursement for these costs. If reimbursement was threatened, as when a problem arose under the wage stabilization program, appellees were diligent in their efforts to obtain an authoritative answer. Although the War Department offered to obtain an authoritative ruling for the appellees on the applicability of the Fair Labor Standards Act, there was no reason for appellees to bother to procure such a ruling since they were assured of reimbursement for any judgments which might be taken against them.

On the face of the record, appellees did not act in good faith by innocently and to their detriment following advice laid down to them by a Government agency without notice that such an interpretation was claimed to be erroneous and invalid. *Hoffman v. Todd & Brown, supra.* Appellees here acted neither innocently nor to their detriment, and were at all times on notice that the Wage and Hour Division considered

the War Department's view to be erroneous and invalid. The record is equally clear that appellees never relied on anything other than their contract and assurances of the War Department that they would be reimbursed for liabilities incurred. In view of the correspondence between appellees and the War Department and their actual knowledge of the dispute between the two Government agencies and the offer of the War Department to obtain an authoritative ruling, the appellees had no reasonable grounds for believing that their acts and omissions were not in violation of the Fair Labor Standards Act. Their only inquiry concerning payment of overtime elicited the answer that the War Department did not know.

In view of the foregoing facts, conclusively established by the uncontroverted evidence, appellees have not established defenses under Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947, U.S.C.A. Sections 258 and 260, and the judgment of the trial court should be reversed.

Respectfully submitted,

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APPENDIX A

PERTINENT SECTIONS OF PORTAL-TO-PORTAL PAY ACT OF 1947 TITLE 29 U.S.C.A. §§258 AND 260

"§258. Reliance on past administrative rulings, etc.

In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice ,or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

"§260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or

omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title."